FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY; LUNDGREN LIMITED FAMILY PARTNERSHIP; RON VANDERYACHT; DAVID C. JONES; FRANCES A. KAUL,
Plaintiffs-Appellants,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; SONNY J. O'NEAL, Supervisor Okanogan National Forest,
Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL; OKANOGAN WILDERNESS LEAGUE; CENTER FOR ENVIRONMENTAL LAW AND POLICY; AMERICAN RIVERS; TROUT UNLIMITED; DEFENDERS OF WILDLIFE,
Defendants-Intervenors-Appellees.

No. 02-35512

D.C. No. CV-01-00192-RHW

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 9, 2003—Seattle, Washington
Memorandum Filed August 14, 2003
Memorandum Withdrawn October 29, 2003

Filed October 29, 2003

Before: Thomas M. Reavley,* A. Wallace Tashima, and Richard A. Paez, Circuit Judges.

Opinion by Judge Reavley

*The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

COUNSEL

Russell C. Brooks, Pacific Legal Foundation, Bellevue, Washington, for the plaintiffs-appellants.

Andrew C. Merger, Department of Justice, Washington, D.C., for the defendants-appellees.

John B. Arum, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for the defendants-intervenors-appellees.

OPINION

REAVLEY, Circuit Judge:

Appellants, plaintiffs below, challenge a decision by the United States Forest Service requiring reduced use of water from ditches in time of low flow, intended to protect certain endangered species of fish. The plaintiffs include Okanogan County, the Early Winters Ditch Company, and several other plaintiffs. The district court granted summary judgment in favor of the federal defendants. We affirm.

BACKGROUND

Plaintiffs use water from the Skyline Irrigation Ditch and the Early Winters Ditch. These ditches traverse the Okanogan National Forest and divert water to plaintiffs for agricultural and other purposes. The Okanogan National Forest was originally set aside as the Washington Forest Reserve in 1897.

The Skyline Irrigation Ditch can be traced to 1903 when the Skyline Ditch Company applied to the Secretary of Interior for a permit to construct and maintain a ditch to take water from the Chewuch River. The permit was granted in July 1903, subject to a contract, which stated:

> It is further agreed and understood that the permission herein granted is subject to revocation by the Secretary of the Interior, in his discretion, at any time, notwithstanding the period for which this agreement is approved may not have then expired.

There followed a special use permit which provided: "Terminable at the discretion of the Forester of the U.S. Department of Agriculture." In 1971, the permit was renewed with a "revocable and nontransferable" special use permit, providing that it may be terminated "at the discretion of the regional forester or the Chief, Forest Service." This permit further stated

that it could be renewed only if the permittee "will comply with the then-existing laws and regulations governing the occupancy and use of National Forest Lands." The permit was renewed in 1979 and 1987, with permits again stating that they were revocable.

The record traces the Early Winters Ditch to 1909, when Harry Briggs and others stated their intent under state law to take water from the Early Winters Creek. The Forest Service granted Briggs a special use permit in 1910 for the Early Winters Ditch, stating that the permittee "shall comply with all the laws and regulations governing National Forests" and that the permit "shall terminate . . . at the discretion of the Forester." The permit was renewed several times. All the later permits were terminable at the discretion of the Forest Service, and further provided that the permit "confers upon the permittee no right to use the water involved." Beginning with the 1971 permit, the Early Winters permits further provided a fixed expiration date and provided that they were subject to renewal only if the permittee complies "with the then-existing laws and regulations governing the use and occupancy of National Forest Lands."

All of the subsequent permits for the two ditches contained similar conditions, stating, for example, that new permits would be issued "in the absolute discretion of the Forest Service," that the permits could be amended at the discretion of the Forest Service to incorporate new terms required by law, and that the permit holder shall comply with all applicable federal laws and standards, including "relevant environmental laws." These permits also stated that they do "not convey any legal interest in water rights as defined by applicable State Law."

Under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-44, the National Marine Fisheries Service (NMFS) listed the steelhead trout and chinook salmon as endangered species, and the Fish and Wildlife Service (FWS) listed the

bull trout as a threatened species. The 1998 special use permits were sent with notices stating:

> Please note that the consultation process for this ditch has not been completed with the [NMFS] for the steelhead trout and the chinook salmon nor with the [FWS] for the bull trout. When the consultation is completed, it may be necessary to amend this permit to include conditions which may be required by the [NMFS] or the [FWS].

The ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat . . . .

16 U.S.C. § 1536(a)(2). Under ESA regulations, an agency is required to consult with either the FWS or the NMFS (the consulting agencies) whenever a federal action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a) (2002). The designated consulting agency under the ESA makes certain determinations and issues a biological opinion under 16 U.S.C. § 1536(b).

In 1998, the Forest Service made biological assessments for all special use permits on the Chewuch River. It concluded that the Skyline Irrigation Ditch was one of the two largest water diversion ditches on the river, and that the ditch's fish screen was ineffective in protecting the steelhead trout. It concluded that continued operation of the ditch was likely to adversely affect the steelhead and chinook salmon. It similarly found that the Early Winters Ditch was likely to

adversely affect the steelhead and chinook by adversely affecting nesting and spawning areas.

The Forest Service initiated formal consultation with the NMFS and FWS. In 2000, NMFS issued biological opinions for the two ditches. It concluded that a proposed plan for the Early Winters Ditch that included using wells in lieu of surface water diversions during low flow conditions was not likely to jeopardize the steelhead and chinook. However, with respect to the Skyline Irrigation Ditch, the NMFS concluded that proposed modifications to the headgate and the fish screen were insufficient, and that the action as proposed was "likely to jeopardize the continued existence of both steelhead and spring chinook salmon and result in the destruction or adverse modification of designated critical habitat."

Under 16 U.S.C. § 1536(b)(4), agency action can be found not to violate the ESA if "reasonable and prudent alternatives" are implemented, and can be approved subject to the implementation of "reasonable and prudent measures." As to the Skyline Irrigation Ditch, the biological opinion found that measures were necessary to "increase the amount of water in the Chewuch River during low flow periods." The Forest Service therefore amended the Skyline Irrigation Ditch special use permit, requiring that instream flows on the river be measured and that diversions to the ditch be limited to maintain certain instream flows. As to the Early Winters Ditch, the biological opinion found that the proposed plan was acceptable under the ESA provided that reasonable and prudent measures were taken including the maintenance of a minimum instream flow for the creek.

The plaintiffs brought this suit for a declaratory judgment, alleging that the actions of the NMFS, the FWS, and the Forest Service concerning the renewals of the special use permits for the two ditches were unconstitutional and exceeded the agencies' statutory authority. The court heard cross-motions

for summary judgment and granted summary judgment in favor of the federal defendants.

DISCUSSION

Appellants argue that the Forest Service lacked the authority to restrict the use of the ditches to maintain instream flow levels for the protection of fish under the ESA. We agree with the district court that the placement of restrictions in the right-of-way permits was within the authority of the Forest Service.

Whatever questions exist as to the standing of the various appellants, they are represented by the same counsel and make the same arguments, and the Early Winters Ditch Company as a permit holder indisputably has standing. We accordingly proceed to the merits. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 & n.9 (holding that where one plaintiff has standing, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit").

At bottom, appellants argue that the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law. The ditch rights-of-way granted over federal land, from their inception, were subject to termination at the discretion of the federal government through its designated agent. The more recent permits expressly state that they do not convey water rights and are subject to amendment "when, at the discretion of the authorizing officer, such action is deemed necessary or desirable to incorporate new terms, conditions and stipulations as may be required by law, regulation, land management plans, or other management decisions." The ESA and regulations promulgated thereunder require federal agencies to consult with designated consulting agencies whenever a federal action "may affect" a threatened or endangered species. *See* 50 C.F.R. § 402.14(a) (2002). The regula-

tions provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights-of-way, *id.* § 402.02(c).

Appellants do not argue on appeal that the Forest Service or the other federal agencies violated any of the requirements or protocols of the ESA. Instead, they in effect argue that compliance with the ESA was not authorized because such compliance would deny them their vested water rights under state law. We cannot agree with this argument for several reasons.

[1] There is authority that the ESA does not grant powers to federal agencies they do not otherwise have. The Supreme Court has stated that section 7 of the ESA "amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1979) (emphasis added, brackets omitted) (quoting 119 Cong. Rec. 42913 (1973)).

[2] However, we are of the view that the Forest Service had the authority to restrict the use of the rights-of-way to protect the endangered fish. The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way.

[3] The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights-of-way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service

to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." These statutes, in our view, give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.

[4] The FLPMA provides that "[n]othing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act," and that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." Pub. L. No. 94-579, § 701(a) & (h), 90 Stat. 2743, 2786-87, *reprinted in* 43 U.S.C.A. § 1701 historical note. Under this savings clause, the government could not under the FLPMA divest a private party of an existing "land use right" or other "valid existing rights," but as described above, the plaintiffs' rights-of-way were always, by their written terms, revocable at the discretion of the federal government. Appellants did not establish that they had vested rights to use the ditches to supply their water needs prior to the enactment of the FLPMA in 1976. On the contrary, the 1901 Act under which the permits were earlier granted provided that right-of-way permits did not grant vested property rights. The 1901 Act stated that the Secretary of the Interior could grant rights-of-way through forest reservations for ditches, but that "any permission given by the Secretary of the Interior under the provisions of this section may

be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (codified at 43 U.S.C. § 959) (repealed 1976).

[5] Appellants rely on *United States v. New Mexico*, 438 U.S. 696 (1978) ("*US v. NM*"). This case held that under a longstanding "implied-reservation-of-water doctrine," *id.* at 701, Congress did not, in enacting the Organic Administration Act and the MUSYA, intend the federal government to reserve water rights for wildlife preservation purposes when it set aside lands for national forests. *US v. NM* did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. As discussed above, the FLPMA specifically authorizes the Forest Service to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law. To quote another Supreme Court case, the pending case "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917).

AFFIRMED.